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Supreme Court of the United States

October Term, 1993

MANUFACTURERS HANOVER
LEASING CORPORATION,

Petitioner,

v.

HAROLD G. LOWREY,
Trustee of Robinson Brothers Drilling, Inc.
and Robinson Brothers Drilling Company,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 547(b) of the Bankruptcy Code provides that a transfer by a debtor on an antecedent debt to a creditor within 90 days of bankruptcy can be avoided. With respect to a creditor, however, who is an insider of the debtor, such a transfer within one year of the bankruptcy of the debtor can be avoided. The question presented is:

> Whether a transfer by a debtor on an antecedent debt between 90 days and one year preceding the date of bankruptcy to a non-insider creditor, which is not otherwise avoidable, can be avoided where such creditor holds a guaranty of the antecedent debt from an insider of the debtor, pursuant to 11 U.S.C. §§ 547(b) and 550(a) of the Bankruptcy Code?

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.1 of the Rules of the Supreme Court of the United States, Manufacturers Hanover Leasing Corporation hereby discloses that it is a corporation and its parent is Manufacturers Hanover Trust Company. During the course of these proceedings Manufacturers Hanover Trust Company was merged with Chemical Bank, and the name of the successor entity is Chemical Bank.

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UNITED STATES CONSTITUTION

U.S. CONST. art. I, § 8 14

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PETITION FOR WRIT OF CERTIORARI

Manufacturers Hanover Leasing Corporation ("Manufacturers Hanover") petitions this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the judgment in *In re Robinson Brothers Drilling, Inc.*, 6 F.3d 701 (10th Cir. 1993). Respondent is Harold G. Lowrey, Trustee of Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company ("Robinson Brothers"), debtors under Chapter 11 of the Bankruptcy Code.

OPINIONS BELOW

On January 11, 1988, the United States Bankruptcy Court for the Western District of Oklahoma granted summary judgment to Manufacturers Hanover. The Order Granting Motion for Summary Judgment is reprinted at Appendix App. 29. The United States District Court for the Western District of Oklahoma reversed the decision of the Bankruptcy Court. The Memorandum Decision and Order is reported at 97 B.R. 77 (W.D. Okla. 1988) and reprinted at Appendix App. 3. Before remand, the District Court certified the matter for interlocutory appeal, and the Tenth Circuit Court of Appeals accepted the case for review. The Tenth Circuit affirmed the decision of the District Court adopting the District Court Opinion and remanded the case. This decision is reported at 892 F.2d 850 (10th Cir. 1989) and reprinted at Appendix App. 1.

After remand, the Bankruptcy Court conducted a trial of the adversary proceeding. On February 19, 1991, the Bankruptcy Court filed its Supplemental Findings of Fact and Conclusions of Law which are reprinted at Appendix App. 33. On February 22, 1991, the Bankruptcy Court entered Judgment which is reprinted at Appendix App. 45. On May 9, 1991, the Bankruptcy Court filed Supplemental Findings of Fact and Conclusions of Law and an Amended Judgment which is reprinted at Appendix App. 47. On May 24, 1991, the Bankruptcy Court again amended the Judgment which is reprinted at Appendix App. 56.

On December 10, 1992, the United States District Court for the Western District of Oklahoma affirmed the Judgment of the Bankruptcy Court. This decision is

reprinted at Appendix App. 58. On September 28, 1993, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court. The issue presented to the Tenth Circuit in the prior interlocutory appeal was again presented to the Tenth Circuit in this appeal, and the Tenth Circuit reaffirmed its prior position on this issue. This decision is reported at 6 F.3d 701 (10th Cir. 1993) and reprinted at Appendix App. 18.

JURISDICTION

This Petition arises under the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"), 11 U.S.C. § 101 *et seq.* The date of the decision of the Court of Appeals for the Tenth Circuit is September 28, 1993. Manufacturers Hanover filed a timely Petition for Rehearing which was denied by the Tenth Circuit on October 29, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. §§ 547 and 550 of the Bankruptcy Code provide in relevant part:

> **§ 547. Preferences**
>
> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

The jurisdiction of the Bankruptcy Court was invoked under 28 U.S.C. §§ 1334 and 157(b). The jurisdiction of the District Court was invoked under 28 U.S.C. § 158(a). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 158(d).

II. Statement of Facts

Manufacturers Hanover entered into several loan transactions with Robinson Brothers Drilling in 1978 and 1979. Robinson Brothers used the loan proceeds to purchase drilling rigs and a helicopter. As a part of these loan transactions, Manufacturers Hanover requested and received the personal guaranty of J. D. Hodges ("Hodges"). Hodges was the president, chief executive officer and controlling shareholder of Robinson Brothers and thus was indisputably an "insider" of Robinson Brothers according to the Bankruptcy Code. 11 U.S.C. § 101(30). Each of the loan agreements required that Robinson Brothers make payments on either a monthly or quarterly basis. Robinson Brothers made some of the required monthly and quarterly payments within the year preceding bankruptcy, but none within the 90 days preceding bankruptcy.

On July 23, 1983, several creditors of Robinson Brothers filed an involuntary petition under Chapter 7 of the Bankruptcy Code. On August 8, 1983, upon application of Robinson Brothers, the case was converted to a case under Chapter 11 of the Bankruptcy Code. Harold G.

Lowrey was appointed as Trustee of Robinson Brothers by the Bankruptcy Court.

On April 11, 1986, the Trustee commenced an adversary proceeding against Manufacturers Hanover and other creditors seeking to avoid transfers made by Robinson Brothers to Manufacturers Hanover and other creditors during the period of 90 days to one year preceding the bankruptcy of Robinson Brothers. Because Manufacturers Hanover held a guaranty from Hodges, the Trustee contended that Hodges was a creditor of Robinson Brothers because he held a contingent claim as a result of his guaranty of the debt of Robinson Brothers to Manufacturers Hanover. The Trustee contended that these transfers benefitted a creditor of Robinson Brothers, namely Hodges. The Trustee alleged that each transfer by Robinson Brothers to Manufacturers Hanover resulted in a benefit to Hodges because of the reduction in liability on his guaranty. Even though the transfers were direct from Robinson Brothers to Manufacturers Hanover, whom the Trustee stipulated was a non-insider creditor, and even though each of the transfers was more than 90 days prior to bankruptcy, the Trustee argued that the transfers could be avoided because Hodges was an insider of Robinson Brothers and, therefore, the extended preference period would apply.

Manufacturers Hanover defended the Trustee's action contending that the transfers were to a non-insider creditor and, therefore, because the transfers were more than 90 days prior to bankruptcy, the provisions of 11 U.S.C. § 547(b)(4)(A) would prohibit recovery from Manufacturers Hanover.

III. Proceedings Below

Manufacturers Hanover moved for summary judgment because, among other reasons, the Trustee stipulated that all of the transfers were more than 90 days prior to bankruptcy. The Bankruptcy Court sustained the motion because of the ambiguities in § 550(a) and the fact that a review of the statute did not indicate that Congress intended to circumvent § 547(b)(4)(A) by permitting recovery from non-insider creditors for transfers more than 90 days prior to bankruptcy. The Trustee appealed and the District Court reversed and remanded deciding that the so-called "plain meaning" of sections 547 and 550 would allow recovery against non-insider creditors.

Before remand, the District Court certified the matter for an interlocutory appeal and the Tenth Circuit Court of Appeals accepted the case for review. The Tenth Circuit affirmed the District Court in a *per curiam* Opinion and remanded the case.

Because the appeal decided only one issue, the Bankruptcy Court conducted a trial of the remaining issues. The Bankruptcy Court granted a portion of the Trustee's requested relief and denied the remaining portion. A money judgment was entered against Manufacturers Hanover.

Manufacturers Hanover appealed to the District Court. Among other issues appealed to the District Court, Manufacturers Hanover contended that Hodges received no benefit as a result of the transfers. Manufacturers Hanover contended that because of Hodges' substantial personal insolvency, which the Bankruptcy Court determined was at least $96,000,000, the transfer by Robinson

Brothers of $175,000 to Manufacturers Hanover did not benefit Hodges because it had little or no effect on his substantial insolvency. In addition, Manufacturers Hanover contended that the language in the personal guaranty continued to impose liability on Hodges regardless of the transfers and, therefore, there was no reduction in Hodges' liability and hence, no benefit to Hodges. The District Court affirmed the decision of the Bankruptcy Court. Manufacturers Hanover appealed to the Tenth Circuit Court of Appeals, and the Tenth Circuit affirmed the District Court decision.

REASONS FOR GRANTING THE WRIT

I.

THE EXPANDED PREFERENCE PERIOD FOR CREDITORS HOLDING GUARANTIES OF INSIDERS IS AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW

The issues outlined in this Petition have a significant impact on numerous daily transactions between creditors and debtors which in many instances, involve significant amounts of money. It would be impossible to determine the number of insider guaranties held by creditors in this country. However, considering the amount of litigation that has occurred in bankruptcy courts over this issue, it is clear that an opinion by the United States Supreme Court on this issue would settle conflicts among bankruptcy courts, district courts and appellate courts and provide uniformity on this issue, thereby providing creditors and debtors with a uniform law. This issue is of

considerable importance to the lending community and trade creditors, both of whom frequently require guaranties from insiders in credit transactions. Manufacturers understands that associations of lenders and other creditors may request permission to file amicus briefs in support of this Petition and, if certiorari is granted, on the merits.

The genesis of this problem began in 1978, when Congress reformed the bankruptcy laws and enacted the Bankruptcy Code found at 11 U.S.C. § 101 *et seq.* Prior to the Bankruptcy Reform Act of 1978, case law and the Bankruptcy Act provided that the trustee in bankruptcy could recover a preferential transfer only from an entity in whose hands it represented a preference within the terms of the preference avoidance section itself. *Dean v. Davis*, 242 U.S. 348, 443, 37 S.Ct. 130, 131, 61 L.Ed. 419 (1917). Bankruptcy Act § 60, 11 U.S.C. § 96.

Since the Bankruptcy Code was enacted in 1978, numerous bankruptcy courts have addressed the issue raised by this Petition. During the early to mid 1980's, virtually all of the bankruptcy courts which addressed the issue reached the same result although they used different theories and reasons in reaching the result.

One approach used by several bankruptcy courts was the "two transfer" approach. *In re Mercon Industries, Inc.*, 37 B.R. 549 (Bankr. E.D. Pa. 1984). Simply stated, the "two transfer" approach in the context of avoidable preference analysis viewed the payment from the debtor as consisting of a direct transfer to the non-insider creditor and a separate indirect transfer of benefit to the insider guarantor. The non-insider creditor was not an initial transferee

or an immediate transferee of the second transfer, and thus no recovery could be made from such creditor by applying § 550(a)(1) or (2). Since the first, direct transfer to such non-insider was made outside the applicable 90-day preference of § 547(b)(4)(A), the first transfer was also not avoidable as to that non-insider.

Another approach used by several bankruptcy courts employed the equitable powers of the bankruptcy court in determining that transfers to non-insider creditors between 90 days and one year could not be avoided by the trustee. To allow recovery from the non-insider creditors would in effect penalize an innocent non-insider for its prudence in seeking a guarantor of the debt. *In re R. A. Beck Builder, Inc.*, 34 B.R. 888 (Bankr. W.D. Pa. 1983). *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D. Tex. 1985).

Another theory involved the interplay between the provisions of 11 U.S.C. §§ 547(b) and 550. These bankruptcy courts reasoned that allowing a trustee to recover from a non-insider creditor pursuant to the provisions of § 550 would in effect expand the preference period from 90 days to one year as to non-insider creditors which was not provided for under the provisions of § 547. *In re Cove Patio Corp.*, 19 B.R. 843 (Bankr. S.D. Fla. 1982).

The overwhelming majority of bankruptcy courts which addressed this issue refused to impose liability on non-insider creditors for transfers more than 90 days prior to bankruptcy. Only one bankruptcy court imposed liability on the non-insider creditor pursuant to the provisions of §§ 547 and 550. *In re Big Three Transport, Inc.*, 41 B.R. 16 (Bankr. W.D. Ark. 1983).

In 1989, the Seventh Circuit Court of Appeals was the first circuit court of appeals to address this issue. *Levit v. Ingersoll Rand Financial Corp., (In re V.N. Deprizio Construction Co.)*, 874 F.2d 1186 (7th Cir. 1989). The Seventh Circuit determined that transfers between 90 days and one year to non-insider creditors holding the guaranties of insiders were subject to avoidance by the trustee. This decision has since been referred to as the *Deprizio* rule. According to the First Circuit Court of Appeals, "The *Deprizio* rule represents a radical departure from pre-Bankruptcy Code practice." *In re Erin Food Services, Inc.*, 980 F.2d 792, 797 (1st Cir. 1992).

The *Deprizio* issue has prompted considerable debate among bankruptcy practitioners, bankruptcy law professors and bankruptcy judges. It has also been the subject of literally hundreds of articles and commentaries.[1] *See* Lawrence P. King, 4 *Collier on Bankruptcy* ¶ 550.02 at 550-8 (15th ed. 1987), and Vern Countryman, *The Trustee's Recovery in Preference Actions*, 3 *Bankruptcy Developments Journal*, 449, 464 (1986), both stating that non-insider creditors should not be liable based on the theory of equity. *See also*, Thomas E. Pitts, Jr., *Insider Guaranties and the Law of Preferences*, 55 Am. Bankr. L.J. 343 (1981), stating that recovery should be allowed from non-insider creditors, and Phillip I. Blumberg, *The Law of Corporate Groups: Bankruptcy Law Section 9.03* (1985 & Supp. 1988), contending that the answer should depend on whether

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[1] *See* Borowitz, *Waiving Subrogation Rights and Conjuring Up Demons in Response to Deprizio*, 45 Bus. Law. 2151, n.2 (1990) listing numerous articles on *Deprizio*.

the insider is solvent. *See also*, Henk J. Brands, *The Interplay Between Sections 547(b) and 550 of the Bankruptcy Code*, 89 Colum. L. Rev. 530, 542-46 (1989), wherein the writer contends that the *Deprizio* rule is flawed because pre-Code practice did not recognize such expansive recovery rights and the legislative history of Code § 550 offers no conclusive evidence of specific congressional intent to depart from the pre-Code practice. *See also*, Katzen, *Deprizio and Bankruptcy Code Section 550: Extended Preference Exposure Via Insider Guaranties and Other Perils of Initial Transferee Liability*, 45 Bus. Law. 511-537 (1990), discussing the impact of the *Deprizio* rule. *See also*, Baker, *Repayments of Loans Guaranteed by Insiders as Avoidable Preferences in Bankruptcy; Deprizio and Its Aftermath*, 23 U.C.C. L.J. 115126 (1990) contending that the statutory construction in *Deprizio* is incorrect, and Higgins and Peterson, *Is There a One-Year Preference Period for Non-Insiders?*, 64 Am. Bankr. L.J. 383 (1990) criticizing the logic and reasoning in *Deprizio* and *Robinson Brothers*.

Until the Supreme Court decides this issue, the debate will continue. Even though two other circuit courts of appeal followed *Deprizio*, *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1992) and *In re Suffola*, 2 F.3d 977 (9th Cir. 1993), many bankruptcy courts and district courts refuse to follow *Deprizio* because they contend that the reasoning in *Deprizio* is flawed and the result is incorrect.[2] Again, the analysis by these courts is varied, further

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[2] Only the Seventh and Ninth Circuits attempted a statutory construction of §§ 547(b) and 550(a). The other circuit courts adopted the *Deprizio* rationale without any significant discussion of the statutory scheme of the Bankruptcy Code.

evidencing the continued uncertainty regarding this issue. In the case of *Matter of Midwestern Companies, Inc.*, 102 B.R. 169 (W.D. Mo. 1989) the district court reasoned that the *Deprizio* interpretation effectively obliterates specific distinctions in § 547(b)(4) between insiders and non-insider creditors. Furthermore, the court stated, "Basic statutory construction requires that statutes be construed in harmony with one another favoring no one statute over another, except that specific statutes limit the scope of general statutes." p. 173. *See also, In re Performance Communications, Inc.*, 126 B.R. 473 (Bankr. W.D. Pa. 1991) determining that *Deprizio* fails to follow basic canons of statutory construction because it only considered a part of the statute when the entire statute should have been considered "to produce a harmonious whole." p. 476 *See also, In re Rubin Bros. Footwear, Inc.*, 119 B.R. 416 (S.D.N.Y. 1990) rejecting *Deprizio* on policy grounds because of its presumed detrimental effects on commercial lending markets.

Thus, those creditors which transact business on a nationwide basis are faced with conflicting court decisions which causes considerable uncertainty in business transactions with debtors, particularly those debtors whose debts are in default and risk the possibility of bankruptcy. For example, a creditor negotiating with a debtor in the Southern District of New York, where *Deprizio* has been rejected, must negotiate with this debtor on a different basis than with a debtor in the Northern District of Illinois, where *Deprizio* is followed. Moreover, a creditor holding the guaranty of an insider such as a subsidiary or the parent of a debtor which has significant operations in Chicago and New York City may

be subjected to "forum shopping" by the debtor in electing where to file its bankruptcy petition. The debtor, by filing in Chicago, can co.nmence an adversary preference action against the creditor in a bankruptcy court in Chicago to avoid and recover transfers to the creditor between 90 days and one year preceding bankruptcy while if the debtor files in the bankruptcy court in New York City, it may not be able to avoid the same transfers because of the refusal by the District Court in the Southern District of New York to follow the *Deprizio* rule.

Creditors and debtors within the jurisdiction of the First Circuit Court of Appeals also face uncertainty regarding the *Deprizio* issue. In *Erin Food Services, supra,* the First Circuit elected to decide the non-insider creditor issue by addressing the issue of benefit to the insider, rather than trying to solve the *Deprizio* puzzle. The *Erin* court acknowledged the disputes over *Deprizio* and the difficulties involved in attempting to unravel congressional intent in sections 547(b) and 550(a). *Erin Food Services, supra* at 798.

Meanwhile, creditors and debtors continue to transact business facing uncertainty and the continued dilemma of dealing with troubled debts amidst the conflicting court decisions. The United States Constitution mandates that Congress enact uniform bankruptcy laws. U.S. CONST. art. I, § 8. Presumably, when Congress enacted the Bankruptcy Code in 1978, it believed that Sections 547 and 550 would create a uniform law. Unfortunately, as has been demonstrated, certain provisions of these statutes have not been interpreted uniformly by the courts. Unless the United States Supreme Court decides

this issue, preference litigation in bankruptcy courts regarding insider guaranties will continue unabated.

II.

THE COURT OF APPEALS INCORRECTLY CONSTRUED SECTIONS 547 AND 550 OF THE CODE AND FAILED TO GIVE EFFECT TO MATERIAL STATUTORY LANGUAGE.

Section 547 of the Code covering voidable preferential transfers is one of several code sections giving the trustee power to avoid transfers made by the debtor. Section 547(b) contains the five elements of a preference action and authorizes the trustee to avoid a transfer if each and every one of those elements is present.

Section 547(c) imposes additional limitations on the trustee's power to avoid preferential payments by creating seven categories of transfers which are exempt in whole or in part from avoidance if the creditor or party in interest against whom recovery or avoidance is sought can establish such exception as applicable to the transfer. See Appendix App. 64. Subsections (b) and (c) of § 547 are clearly interrelated. Indeed, the exceptions contained in (c) are expressly integrated into (b) at the very outset of that subsection.

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of the property of the debtor in property . . . .

Thus, the subsection (b) provisions as to avoidability and the subsection (c) provisions as to nonavoidability are two sides of the same point. Each of the elements of avoidable preference in (b) must be established and none

of the exceptions in (c) may be present before a transfer may be avoided.

Of particular significance in this case is the element of an avoidable preferential transfer as set forth in subsection (b)(4) of § 547 which provides that the transfer must be made

> (A) On or within 90 days before the date of the filing the petition; or
>
> (B) Between 90 days and one year before the date of the filing the petition, if such creditor, at the time of such transfer was an insider;

Thus, transfers to non-insiders prior to 90 days before the filing of the petition commencing the bankruptcy case are not avoidable. However, transfers to insiders (as defined in § 101(30)) may be avoidable if made at any time within one year of the filing. Had the circuit court simply attempted to determine if all the elements of an avoidable preference contained in § 547 were present as to Manufacturers Hanover with respect to the transfers in issue, it would have found that subsection (b)(4) was not satisfied since such transfers were made beyond the 90-day period of subsection (b)(4)(A) which is applicable to non-insiders. Instead, the circuit court held that Manufacturers Hanover could be vicariously liable for transfers which were avoidable as to the insider guarantor, by finding that Manufacturers Hanover was an initial transferee under § 550(a)(1) of the Code of avoidable transfers made for the benefit of the insider.

In reaching its conclusion, the Tenth Circuit failed to give effect to material language of § 550(a) and as a consequence, the material language of § 547(b)(4)(A) as

well. Section 550(a) of the Code implements the avoidance sections of the Code, including § 547, by prescribing the persons for whom a recovery may be had from a transfer that had been avoided and the limits on such recovery. It provides:

> (a) Except as otherwise provided in this section, *to the extent that a transfer is avoided under section* 544, 545, *547*, 548, 549 or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer is made; or
>
> (2) any immediate or mediate transferee of such initial transferee (Emphasis added).

The Tenth Circuit held that a literal interpretation of § 550(a)(1) authorized recovery from creditors, like Manufacturers Hanover, who received payment on their debts from the debtor, and thus are arguably initial transferees, even though the trustee could not satisfy all of the requirements of § 547(b) with respect to the payments to them. This interpretation was erroneous, since it completely ignores the qualifying language of § 550(a) which permits recovery only "to the extent that a transfer is avoided under . . . section 547." Indeed, no mention whatsoever, let alone discussion, of this material statutory provision appears in the circuit court opinion, not even as part of its quotation of the statute itself. This, despite the circuit court's stated reliance on the "plain language" of the statute.

This interpretation by the circuit court fails to give effect to all of the material language of each statute, nor does it consider the statutory scheme in general relating to avoidance actions. As recently stated by this Court with respect to the Bankruptcy Code,

> [V]iewed in the isolated context of . . . [the statutory phrase] the phrase could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. . . . That is the case here. (Citations omitted).

United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 370 (1988).

The circuit court, without mentioning the "to the extent" limitation upon § 550 recovery, indicated that non-insider creditors with insider guaranties "still have section 547(c) defenses available, if applicable." *Robinson Bros.*, 97 B.R. 82. *See also Deprizio supra* at 1199. But this concession fatally undercuts the rationale of the circuit court decision and the cases upon which it relies. Under that rationale, subsection (c) defenses of the non-insider creditor, like subsection (b) defenses, should not be considered at all once a transfer is avoidable under § 547(b) as to the insider guarantor, since the so-called "plain language" of § 550 entitles the trustee to recover from the non-insider creditor, i.e., the "initial transferee," without regard to whether the transfer would be independently

subject to avoidance as to that creditor. Under the rationale of the circuit court opinion, once it is determined that a transfer is avoidable as to the guarantor, there is no need to make any further determination as to whether the transfer is independently avoidable as to the initial transferee creditor and the defenses of that creditor under subsection (c) of § 547, as well as those under subsection (b), are irrelevant. To be consistent, the circuit court should have concluded that if subsection (c) defenses are available to Manufacturers Hanover, the subsection (b) defenses also must be available, including the 90-day limitation period on avoidance actions. Thus, Manufacturers Hanover submits that the circuit court improperly construed the provisions of sections 547 and 550 and furthermore failed to consider the entire statutory scheme of the Bankruptcy Code as it relates to avoidance actions.

CONCLUSION

The debate regarding the *Deprizio* rule continues because bankruptcy courts, district courts and courts of appeal have issued conflicting decisions on this important but unsettled question of federal law. Without a decision by this Court, credit transactions will remain unsettled causing continued and unnecessary litigation in the various courts.[3] The circuit court's misinterpretation

[3] The Supreme Court may wish to solicit the opinion of the Solicitor General on this matter because the federal government through the appointment of the Federal Deposit Insurance Corporation as receiver of a failed bank many times holds the guaranties of insiders on troubled debts. In addition, many times the federal government demands guaranties from insiders

of sections 547 and 550 of the Bankruptcy Code, because of its failure to consider the entire statutory scheme of the Bankruptcy Code, misapplies the principles of statutory construction established by this Court in *United Savings Ass'n v. Timbers, supra.*

For the foregoing reasons, this Court should grant a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review its decision in this case and resolve the question regarding the *Deprizio* rule.

Respectfully submitted,

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through its agencies that make loans such as the Small Business Administration or the Department of Housing and Urban Development. In *Deprizio*, the United States argued that the "to the extent" provisions of § 550(a) "should be read to mean that the trustee can recover from a particular creditor only 'to the extent that' he satisfies the requirements of § 547 as to that creditor." Page 10 of United States Brief in *Deprizio*.

In re ROBINSON BROTHERS DRILLING INC., and Robinson Brothers Drilling Company, Debtors.

MANUFACTURERS HANOVER LEASING CORP.; Halliburton Company; Gray Tool Company; and Ponder Fishing Tools, Inc., Defendants-Appellants,

v.

Harold G. LOWREY, Chapter 11 Trustee, for the Estate of the Debtors, Plaintiff-Appellee.

No. 88-2982.

United States Court of Appeals, Tenth Circuit.

Nov. 9, 1989.

Theodore Gewertz (Lawrence P. King, of Wachtell, Lipton, Rosen & Katz, New York City; James Vogt, Norman E. Reynolds, and V. Burns Hargis, of Reynolds, Ridings & Hargis, Oklahoma City, Okl., Richard Gerard, of Mfrs. Hanover Leasing Corp., New York City, Robert N. Sheets, of Phillips, McFall, McVay, Sheets, Juras & Lovelace, Doneen Douglas Jones, of Fellers, Snider, Blankenship, Bailey & Tippens, and Bruce Kerr, of Mahaffey & Gore, Oklahoma City, Okl., with him on the brief), of Wachtell, Lipton, Rosen & Katz, New York City, for defendants-appellants.

Gary L. Morrissey of Kenan & Peterson, Oklahoma City, Okl., for plaintiff-appellee.

John J. Gill, General Counsel, and Michael F. Crotty, Associate General Counsel, of the American Bankers Ass'n, Washington, D.C., amicus curiae.

Before TACHA, BARRETT, and BRORBY, Circuit Judges.

PER CURIAM.

We affirm the judgment of the district court below and adopt its opinion, which is published at 97 B.R. 77.

In re ROBINSON BROTHERS DRILLING, INC., and Robinson Brothers Drilling Company, Debtors.

Harold G. LOWREY, Chapter 11 Trustee, for the Estate of Debtors, Plaintiff,

v.

FIRST NATIONAL BANK OF BETHANY; Global Fluids, Inc.; Gray Tool Company; Halliburton Co.; J.D. Hodges, an individual; ITT Commercial Finance Corp.; Lor, Inc.; Manufacturers Hanover Leasing Corp.; and Ponder Fishing Tools, Inc., Defendants.

No. CIV-88-732-P.
Bankruptcy No. 83-1962-A.
Adv. No. 86-0252.

United States District Court,
W.D. Oklahoma

Nov. 9, 1988.

Gary L. Morrisey, Kenan & Peterson, Oklahoma City, Okl., for plaintiff.

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James Vogt, Reynolds, Ridings & Hargis, Oklahoma City, Okl., for Manufacturers Hanover Leasing Corp.; Richard Gerard, New York City of counsel.

Doneen Douglas Jones, Fellers, Snider, Blankenship Bailey & Tippens, Oklahoma City, Okl., for Halliburton Co.

Robert N. Sheets, Phillips, McFall, McVay, Sheets, Juras & Lovelace, Oklahoma City, Okl., For Gray Tool Co.

Bruce Kerr, Mahaffey & Gore, Oklahoma City, Okl., for Ponder Fishing Tools.

MEMORANDUM DECISION
AND ORDER

PHILLIPS, District Judge.

I. HISTORY OF PROCEEDINGS

Before the Court is the appeal from the bankruptcy court's Order Granting Motion for Summary Judgment, filed January 11, 1988. Appellant Harold G. Lowrey, Chapter 11 Trustee, filed his brief on May 12, 1988. First National Bank of Bethany, et al., Appellees, filed a response on June 8, 1988, to which Appellant replied on June 27, 1988. Appellees filed a special reply brief on July 11, 1988, and a letter of additional authorities was mailed to the court on August 31, 1988. Appellant filed a special reply brief on August 12, 1988. Oral arguments were heard by the Court on September 22, 1988.

A. FACTS

The facts in this appeal from summary judgment are undisputed. They are:

(1) J.D. Hodges personally guaranteed payment of certain debts owed by Robinson Brothers Drilling, Inc. ("RBDI") to each Appellee.

(2) J.D. Hodges was a corporate officer and shareholder of RBDI.

(3) During the period between 90 days and one year before RBDI entered bankruptcy, RBDI made payments in partial satisfaction of RBDI's debts to Appellees.

(4) On July 25, 1983, involuntary bankruptcy petitions were filed against RBDI.

(5) None of the Appellees are insiders of RBDI within the definition of Title 11 U.S.C. § 101(30)(B).

(6) J.D. Hodges was an insider of RBDI within the definition of Title 11 U.S.C. § 101(30)(B).

Brief of Appellant at 5 (filed May 12, 1988); Answer Brief of Appellees at 1-2 (filed June 8, 1988).

B. RELEVANT STATUTES

The statutes at issue in this case are Title 11 U.S.C. § 547(b)(1) & (b)(4)(B) and Title 11 U.S.C. § 550(a)(1). Section 547(b)(1) & (b)(4)(B) provides that the trustee in bankruptcy can avoid a transfer of money "to or for the benefit of a creditor . . . made – between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider." Title 11 U.S.C. § 550(A)(1) provides that the trustee may recover from "the initial transferee of such transfer or the entity for whose benefit such transfer was made."

C. THE BANKRUPTCY COURT'S DECISION

In its summary judgment order of January 11, 1988, the bankruptcy court ruled as follows:

> [T]he Trustee, under these circumstances, cannot utilize 11 U.S.C. § 550(a) to recover payments received by defendants who hold guarantees of J.D. Hodges, an insider of debtor, outside of the 90 day period and within one year of the filing of the bankruptcy. Furthermore, the [Bankruptcy] Court finds that a reading of 11 U.S.C. § 550(A) does not indicate that Congress explicitly intended to circumvent 11 U.S.C. § 547 by permitting recovery for transfers outside of the 90 day period and within one year from non-insider creditors. Based upon the ambiguities in 11 U.S.C. § 550, the [Bankruptcy] Court must consider the equities involved. A review of the equitable considerations and long settled credit practices involving guarantees, mitigates against permitting recovery from the non-insider creditors.

Order Granting Motion For Summary Judgment at 2.

The District Courts and bankruptcy judges have struggled for years with transactions involving debtors who pay preferential debts while on the brink of bankruptcy. One of the issues in this area which has received little treatment by the circuit courts is under what circumstances a transfer can be avoided and recovered when the transfer is made to a creditor which benefits a guarantor who is an insider of the debtor. The specific issue now before the Court is whether a debtor's transfer, made more than 90 days before but within one year of the filing of the bankruptcy petition, to a non-insider creditor who

holds a guarantee from an insider of the debtor, constitutes an avoidable preference recoverable by the trustee from the non-insider creditor. Unlike the bankruptcy court below, this Court answers the question in the affirmative, holding that such a transaction constitutes an avoidable preference under the bankruptcy laws.

II. STANDARD OF REVIEW

In reviewing a bankruptcy court's decision, the district court functions as an appellate court and is authorized to affirm, reverse or modify the bankruptcy court's ruling or to remand the case for further proceedings. Fed.R.Bankr.P. 8013. The Court may examine the bankruptcy court's conclusion of law *de novo*. *In re Mullet*, 817 F.2d 677, 678-79 (10th Cir.1987). A bankruptcy appeal allows the district court to make an independent determination of the bankruptcy court's conclusions when legal conclusions are drawn from undisputed evidence. *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1169 (10th Cir.1985) (citing *Colorado Springs Nat'l Bank v. United States*, 505 F.2d 1185, 1189 (10th Cir.1974)).

III. LEGAL DISCUSSION

There are two schools of thought regarding the issue of whether a trustee can avoid and recover a transfer of money paid to non-insider creditors during the preferential period when such debt was paid for the benefit of an insider guarantor. One school, representing the minority view, advocates strict construction of the plain meaning of the statutes in question. The other school relies on the

creation of a "two-transfer" theory to overcome the express language of the statutes by an equity argument.

Appellees argued below that the "two-transfer" theory applies to the circumstances of the present case. Under this theory, the first transfer is represented by the direct payment from the debtor to the Appellees. The second transfer is represented by the indirect transfer to the guarantor by virtue of the satisfaction of the guarantor's contingent liability. *See Kellogg v. Blue Quail Energy, Inc. (In re Compton)*, 831 F.2d 586, 591-95 (5th Cir.1987), *reh'g granted*, 835 F.2d 584 (1988) (per curiam) (citing *National Bank of Newport v. National Herkimer County Bank*, 225 U.S. 178, 184, 32 S.Ct. 633, 635, 56 L.Ed. 1042 (1912); 11 U.S.C. § 101(50) (definition of transfer); and discussing *In re Mercon Indus., Inc.*, 37 B.R. 549, 552 (Bankr.E.D. Pa.1984)). Appellees argue that under Section 547(b)(4)(B), only the second transfer to the guarantor, an insider, is within the preferential period and therefore avoidable; the first transfer to the Appellees is not avoidable, however, because they are not insiders. The Court finds this argument unpersuasive to overcome the express language of the statutes for the reasons developed below.

The contrary school of thought is represented by jurists who have strictly construed the statutes. The Trustee defends this minority view, and argues that a Trustee under Section 547)b)(1) & (b)(4)(B) can avoid a transfer of money "to *or for the benefit of* a creditor . . . made – between ninety days and one year before the date of the filing of the petition, *if such creditor at the time of such transfer was an insider.*" 11 U.S.C. § 547(b)(1) & (b)(4)(B) (emphasis added).

The Trustee reasons that the guarantor (Hodges) was an insider, and that as a guarantor, he is a creditor. The Bankruptcy Code defines creditor as "an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(9)(A). The Trustee buttresses this argument that a guarantor is included in the definition of creditor by citing the legislative history of Title 11 U.S.C. § 101(9)(A) found in the definitional section of the Code: "A guarantor of or surety for a claim against the debtor will also be a creditor, because he will hold a contingent claim against the debtor that will become fixed when he pays the creditor whose claim he has guaranteed or insured." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 309-10 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 22 (1978), U.S. Code Cong. & Admin.News 1978 pgs. 5787, 5808, 6266-6267 *quoted in Norton Bankr. Code Pamphlet* 1987-1988 Ed., [21]; 4 *Collier on Bankruptcy*, § 547.18 (15th ed. 1981). Thus, part one of the Trustee's argument is that under Section 547(b)(1) & (b)(4)(B) the transfer is avoidable. *See* H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 375 (1977) *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 6331 (avoidance/recovery bifurcation discussion).

In the second part of the Trustee's analysis, it is urged that under Section 550(a)(1) a trustee may recover from "the *initial transferee of such transfer* [i.e. Appellees] *or* the entity for whose benefit such transfer was made [i.e. guarantor Hodges]." 11 U.S.C. § 550(a)(1) (emphasis added).[1] In short, the Trustee seeks a literal interpretation

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[1] As one critic has observed:

> As hard as one searches, one is unable to uncover any material evidence in the Code or its legislative history

of Sections 547(b)(1) & (b)(4)(B) and 550(a)(1) which, when read in conjunction with Section 101(9)(A), would clearly allow an avoidance of the transfer from the debtor to Appellees made within the preferential period. This transfer, the Trustee contends, can be recovered because it served to benefit an insider (i.e. guarantor Hodges) of the debtor. In this Court's view the intent of Congress seems clear, and cannot be circumvented by the creation of a "two-transfer" theory.

> that Congress intended paragraph 550(a)(1) to operate less than literally merely because of one of the potential defendants designated in that paragraph supplies the factual predicate for avoiding a transfer. In fact, in the original bills approved by the Senate and the House of Representatives, each version of Section 550 mandated recovery from the "initial transferee".

Pitts, *Insider Guaranties and the Law of Preferences*, 55 Am.Bankr.L.J., 343, 347 (1981) (citing S. 2266, 95th Cong. 2d Sess. § 101 (1978) (proposed 11 U.S.C. § 550(a)(1); H.R. 8200, 95th Cong. 1st Sess. § 101 (1977) (proposed 11 U.S.C. § 550(a)(1))).

"In the precursor to Section 550 proposed by the Commission on the Bankruptcy Laws of the United States, the primary target of the trustee's recovery was likewise the initial transferee." REPORT OF THE COMMISSION OF THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc No. 93-137, 93rd Cong. 1st Sess. Pt. II, at 127 (1973) (§ 4-409(a)). "In explaining this section, the Commission stated that it 'covers all initial transferees of recoverable property, *not just those preferred.*')" *Id.* at 180 n. 2 (emphasis supplied by reporting court) *reported in In re Big Three Transp., Inc.*, 41 B.R. 16, 21 n. 1 (Bankr.W.D. Ark.1983).

The Court notes that the Tenth Circuit has not squarely ruled on this issue.[2] However, after the bankruptcy court's decision in the present case, the Seventh Circuit developed a hypothetical example that is foursquare with the circumstances of this case. The Seventh Circuit set forth a persuasive policy that is in alignment with the Trustee's argument in this case:

> There is a related, and more nettlesome, question about the use of equitable powers under § 550(a). Genuine transferees can be caught in a time warp as a result of the special treatment of inside guarantors. Suppose Firm borrows money from Lender, with Guarantor and surety. When Firm pays off the debt, Lender is the "initial transferee" and Guarantor is an "entity for whose benefit [the] transfer was

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[2] The Fourth Circuit has accepted the "two-transfer" theory in principle, and acknowledged equity can be considered. But the compelling circumstances before that Circuit, and the principal case it cited, dealt with mere conduits of funds who initially accepted money, without consideration, and simply transferred the money to the second transferee. Thereafter, the trustees tried to recover money from these initial transferees. *In re Harbour*, 845 F.2d 1254, 1255-58 (4th Cir.1988) (holding mother of ultimate recipient accepted initial transfer and her bad faith precluded equity); *see also Katz v. First Nat'l Bank of Glen Head*, 568 F.2d 964, 969 n. 4 (2nd Cir.1977) (acknowledging broad definition of transfer), *cert. denied*, 434 U.S. 1069, 98 S.Ct. 1250, 55 L.Ed.2d 771 (1978) *cited in Kellogg v. Blue Quail Energy, Inc. (In re Compton)*, 831 F.2d at 591-94 (application of doctrine of indirect transfer used as a sword to avoid a letter of credit transfer). This Court believes that the two actual transfers, and the "mere conduit" problem in those cases make them clearly distinguishable from the circumstance under review where there is only the fiction of the second transfer.

made". The payment of a debt benefits the guarantor. Each may have received a preference voidable under § 547 (and therefore recoverable under § 550). If Guarantor is a stranger to Firm, the trustee may recover only preferences within 90 days of the petition. 11 U.S.C. § 547(b)(4)(A). If guarantor is an "insider" at the time of the transfer, the preference period lasts a year. 11 U.S.C. § 547(B)(4)(B). Section 547(B)(4) distinguishes according to the status of Guarantor, but § 550 does not. It says that if a transfer is recoverable by the trustee, it may be recovered from *either* the "initial transferee" (Lender) or the "entity for whose benefit such transfer was made" (Guarantor). This creates a situation that several courts have perceived to be "inequitable": Lender must satisfy the trustee (if Firm goes bankrupt between 91 days and a year after the preference) when Guarantor is an insider but not when Guarantor is a stranger, yet it seems, this has nothing to do with any proper theory of Lender's liability. Most bankruptcy courts that have addressed this question conclude that "equity" will relieve Lender from a literal construction of § 550. Commentators, whose articles collect and discuss the cases, are divided. We have serious doubts both about the amount of equity in Lender's position (for Firm may have paid Lender preferentially only to assist Guarantor, the insider, and Lender is in a good position to monitor the performance of its debtor; if Firm collects from Lender, Lender may collect in turn from Guarantor, bearing the risk of Firm's insolvency it planned to bear all along) and about the propriety of judges' declining to enforce statutes that produce inequitable results. Bankruptcy statutes are not special cases. We

> mention the problem not to resolve it (for it is not before us) but to show that this appeal to "equity" – to deny recovery against an "initial transferee" within the statute – is different in source and scope from the way in which we have employed considerations of policy to *define* "transferee" under § 550(a)(1). Doubts about this use of equity do not imply that courts should take "transferee" for all it could be worth rather than for what a sensible policy implies it is worth.

Bonded Fin. Serv., Inc. v. European Am. Bank, 838 F.2d 890, 894-95 (7th Cir.1988) (dictum) (citations omitted) (emphasis in original). Admittedly, the Seventh Circuit spoke to this issue only in dictum, but this Court is persuaded to follow the Seventh Circuit's sound guidance for heeding the clear intent of Congress, as have other courts. *In re V.N. Deprizio Constr. Co.*, 86 B.R. 545 (N.D.Ill.1988) *rev'g* 58 B.R. 478 (Bankr.N.D.Ill.1986); *In re Coastal Petroleum Corp.*, 91 B.R. 35 (Bankr.N.D.Ohio 1988); *In re Big Three Transp., Inc.*, 41 B.R. 16 (Bankr.N.D.Ill.1986).

The majority view among lower courts who have decided the issue is supported by either the "two-transfer" theory discussed above, or by relying on the equitable powers of the bankruptcy court under Title 11 U.S.C. § 105 to prevent injustice, or both.[3] *See, e.g.*, note 2 above and the authorities cited therein; *In re Mercon Indus., Inc.*, 37 B.R. 549, 552 (Bankr.E.D.Penn.1984); *Seeley v. Church*

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[3] Although Appellees argued the "two-transfer" theory below, there is no mention of this theory in the ruling of the bankruptcy court.

Bldgs. & Interiors Inc. (In re Church Bldgs. & Interiors, Inc.), 14 B.R. 128, 131 (Bankr.W.D.Okla.1981); *In re V.N. Deprizio Constr. Co.*, 58 B.R. 478, 480 (Bankr.N.D.Ill.1986), *rev'd*, 86 B.R. 545 (N.D.Ill.1988); 4 *Collier on Bankruptcy*, ¶ 550.02 (15th ed. 1983).

The stated policy reason behind developing the "two-transfer" theory is that, in effect, strict construction of the statutes prejudices informal debt reorganization practices by punishing creditors who insist on guarantors. *See e.g., 4 Collier on Bankruptcy*, ¶ 550.02. *But see In re V.N. Deprizio Constr. Co.*, 86 B.R. at 553. This reasoning overstates the issue. Only insider guarantors trigger the one-year preference avoidance mechanism of Section 547(b). Non-insider creditors with non-insider guarantors are not included in the expanded one-year preference period. Moreover, creditors still have Section 547(c) defenses available, if applicable.

In the present case the bankruptcy court followed the lower court majority view by using its equitable powers to overcome what it perceived as ambiguities in the statutes. Order Granting Motion For Summary Judgment at 2. *But see In re V.N. Deprizio Constr. Co.*, 86 B.R. at 552-53 (persuasive criticism of the equity argument).

IV. RESOLUTION OF ISSUE ON APPEAL

It is rare that this court substitutes its judgment for that of any of the outstanding bankruptcy judges who serve the Western District of Oklahoma. Their expertise and judgment in the field of Bankruptcy is rarely subject to credible challenge. This case, however, presents a matter of pure statutory interpretation applied to undisputed

facts. Moreover, other courts have addressed the issue since the bankruptcy court's decision below. This Court believes that the minority view, advocating a literal interpretation of the Bankruptcy Code as enacted by Congress, is the most persuasive and compelling, and avoids the result-oriented approach of the "two-transfer" theory.

The equitable powers of the bankruptcy court under Section 105 to avoid strict construction of the Code is limited. *Official Comm. of Equity Sec. Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1228, 99 L.Ed.2d 428 (1988) (quoting *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 791 F.2d 524, 528 (7th Cir.1986), *cert. denied*, 481 U.S. 1068, 107 S.Ct. 2460, 95 L.Ed.2d 869 (1987) ("the fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be")); *Guerin v. Weil, Gotshal & Manges*, 205 F.2d 302, 304 (2nd Cir.1953).[4]

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[4] *See also Cooper Petroleum Co. v. Hart*, 379 F.2d 777 (5th Cir.1967); *In re Aerco Metals, Inc.*, 60 B.R. 77 (Bankr. N.D.Tex.1985); Nutovic, *The Bankruptcy Preference Laws: Interpreting Code Sections 547(c)(2), 550 (a)(1), and 546(a)(1)*, 41 BUS.LAW. 175, 186-91 (Nov.1985); and Pitts, *Insider Guaranties and the Law of Preferences*, 55 AM.BANKR.L.J. 343 (1981) (non-insider creditor is liable if there is an insider guarantor); *cf.* P. Blumberg, *The Law of Corporate Groups: Problems in Bankruptcy*, § 9.03 (1985) *discussed in Bonded Fin. Serv., Inc. v. European Am. Bank*, 838 F.2d at 894 ("liability should turn on Guarantor's solvency"); and *Norton Bankruptcy Law Advisor*, "Insider Guarantees and Preference Liability – Round Three Article 4," Professor Boshkoff (1986-10) *cited in in re Vermont Toys Works, Inc.*, 82 B.R. 258, 326 n. 42 (Bankr.D.Vt.1987).

The Court is persuaded that a transfer to a creditor for the benefit of an insider guarantor can be avoided and recovered. The mischief that the Code is attempting to correct by its plain language is the situation where a debtor is in financial trouble and contemplates paying preferential debts on the brink of bankruptcy. In that instance, one creditor is preferred over others because an insider who guaranteed the note on the debt will be contingently liable upon debtor's default.[5] Thus, under the Code a trustee can avoid these transfers made on behalf of an insider guarantor during the more broad preferential period of 90 days to one year. With plain language, Congress developed this hard and fast rule to help prevent litigation over the issue of bad faith preferential payments by debtors. Unfortunately, this rule does not necessarily have a just result in all cases. Under the present case, for example, there is no evidence of bad faith associated with the payments by the debtor. However, because the transfer of money to Appellees serves to benefit the guarantor Hodges, who is an insider, the transfer is covered by the statutes, and is thus avoidable and recoverable.

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[5] These insiders commonly benefit in the form of increased salaries, bonuses or stock dividends, from the debtor's receipt of the funds, when the monies serve to increase the debtor's revenue. When the debtor's demise is imminent, the insiders who guaranteed the debtor's loan frequently hold enough sway with the debtor to cause it to pay off these guaranteed loans prior to the payment of other obligations. Consequently, the insiders have diverted resources to protect themselves. *In re Mercon Indus. Inc.*, 37 B.R. at 553. For a definition of insider of a corporate debtor see Title 11 U.S.C. § 101(30)(B).

V. CONCLUSION

Accordingly, the bankruptcy court's Order Granting Motion For Summary Judgment is REVERSED and the case is REMANDED for further proceedings consistent with this Order.

IT IS SO ORDERED.

In re ROBINSON BROTHERS DRILLING, INC. and Brothers Drilling Company, Debtors.

Harold G. LOWREY, Trustee, Appellee,

v.

MANUFACTURERS HANOVER LEASING CORP., Appellant,

and

Global Fluids, Inc.; ABB Vecto-Gray, Inc., formerly known as Gray Tool Company; First National Bank of Bethany, Oklahoma; Halliburton Company; J.D. Hodges; ITT Commercial Finance Corporation; Lor, Inc.; Ponder Fishing Tools, Inc., Creditors.

No. 93-6016.

United States Court of Appeals,
Tenth Circuit.

Sept. 28, 1993.

James Vogt, of Reynolds, Ridings, Vogt & Morgan, Oklahoma City, OK and Richard Gerard, Manufacturers Hanover Leasing Corp., New York City, for appellant.

Gary L. Morrissey, Oklahoma City, OK, for appellee.

Before LOGAN and BRORBY, Circuit Judges, and KANE,* District Judge.

BRORBY, Circuit Judge.

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* Honorable John L. Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

We are called upon in this appeal[1] to consider the unusual suggestion that, for purposes of the preferential transfer section of the Bankruptcy Code, a comparatively minor reduction in a preferred creditor's extensive financial liabilities conferred no cognizable economic benefit on the creditor because his remaining debts still vastly overwhelmed his assets. Reasons both legal and practical lead us to reject such a view.

The Trustee brought this adversary proceeding under 11 U.S.C. §§ 547(b) and 550(a) to avoid and recover certain allegedly preferential prepetition transfers by debtors to various creditors, including appellant Manufacturers Hanover Leasing Corp. (Manufacturers). Because these payments were made more than ninety days but less than one year before the petition was filed, the Trustee relied on § 547(b)(4)(B), which permits avoidance of preferential transfers within this relatively remote time frame if the benefitting creditor was an insider. Although Manufacturers itself was an outsider, debtors' obligation to Manufacturers had been guaranteed by debtors' president, chief executive officer, and controlling shareholder, J.D. Hodges. On a prior appeal in this same proceeding, this court recognized that as guarantor of a debt on which his corporation had made prepetition payment, Hodges could fulfill the insider-creditor requirement of the statute. *See Manufacturers Hanover Leasing*

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. Accordingly, appellant's request for oral argument is denied and the case is ordered submitted on the briefs.

Corp. v. Lowrey (In re Robinson Bros. Drilling, Inc.), 892 F.2d 850 (10th Cir.1989) (adopting district court opinion, *see Lowrey v. First Nat'l Bank (In re Robinson Bros. Drilling, Inc.)*, 97 B.R. 77 (W.D.Okla.1988), holding that § 547(b)(4)(B) permits avoidance of transfer to noninsider-creditor inuring to benefit of insider-guarantor). Other circuits have likewise found § 547(b)(4)(B) satisfied in connection with such "trilateral-preference" arrangements. *See Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490, 1494 (6th Cir.1990); *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1200-01 (7th Cir.1989).

On remand from that earlier decision, Manufacturers defended against the Trustee's adversary complaint by arguing, among other points, that: (1) Hodges' hopeless insolvency precluded him from gaining a cognizable benefit from a merely partial reduction in his liabilities; (2) even if such a benefit were theoretically possible, the actual $175,000 reduction in Hodges' guarantor liability to Manufacturers was de minimus relative to his overall negative net worth (over $96 million) and, thus, should not be recognized as a benefit; and (3) in any event, Hodges' liability exposure was not really reduced by debtors' prepetition transfer because his guaranty provided "it shall continue to be effective, or be reinstated, as the case may be, if at any time payment [by debtors] . . . is rescinded or must otherwise be restored or returned by [Manufacturers] upon [debtors'] insolvency, bankruptcy or reorganization . . . , all as though such payment had not been made." Appellant's App. at 90 (bankruptcy court quoting guaranties). On appeal from

the ensuing judgment entered in favor of the Trustee, Manufacturers reasserts these same three arguments.[2]

Under 11 U.S.C. § 547(g), a trustee seeking to avoid an allegedly preferential transfer under § 547(b) "has the burden of proving by a preponderance of the evidence every essential, controverted element resulting in the preference." 4 Collier on Bankruptcy ¶ 547.21[5] at 547-93 (15th ed. 1993); *see, e.g., Sloan v. Zions First Nat'l Bank (In re Castletons, Inc.)*, 990 F.2d 551, 555 (10th Cir.1993) (trustee's avoidance claim rejected because "she did not satisfy her burden of proof under § 547(b)(5)"). The bankruptcy court and district court both held that the Trustee had satisfied his burden on the controverted issue of benefit under §§ 547(b)(1), (b)(4)(B) by establishing debtors' $175,000 payment to Manufacturers on the obligation guarantied by Hodges. Reviewing the bankruptcy court's underlying factual findings for clear error and its legal conclusions de novo, *see Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.)*, 966 F.2d 1338, 1340 (10th Cir.1992), we affirm for the reasons to follow.

The benefit requirement imposed by §§ 547(b)(1), (b)(4)(B) is clearly satisfied when an insider-creditor receives a "quantifiable monetary reduction" in his financial liability to a third party for which he would have had

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[2] Manufacturers also notes its opposition to this court's prior determination that benefit to insider-guarantors can support avoidance and recovery of prepetition transfers made to outsider-creditors, pursuant to § 547(b)(4)(B). Recognition of such trilateral preferences now being law of the case, Manufacturers formally raises the issue again merely as a precaution to preserve its position in anticipation of a petition for certiorari.

only the bankruptcy estate to look to for reimbursement. *See The Travelers Ins. Co. v. Cambridge Meridian Group, Inc. (In re Erin Food Servs., Inc.)*, 980 F.2d 792, 800-01 (1st Cir.1992). Thus, "[t]here can be no question that [for purposes of the preference statute] an insider-guarantor derives measurable economic benefit from a payment on the guaranteed debt, *to the extent the insider's contingent liability on the personal guaranty is reduced.*" *Id.* at 797 (emphasis in original); *see also Levit*, 874 F.2d at 1190, 1194 (reduction in debtor's obligation to creditor diminishes financial exposure of guarantor; debtor's transfer to creditor undoubtedly produces a benefit for guarantor).

Aside from Manufacturers' legal argument that the quoted text from Hodges' guaranty precluded *any* substantive reduction in his liability, which we address and reject infra, Manufacturers does not dispute the fact that debtors' prepetition payment reduced, dollar for dollar, Hodges' liability as guarantor. Instead, Manufacturers contends that because that reduction obviously could not lift Hodges out of insolvency, he received no cognizable benefit. Manufacturers cites no pertinent authority, nor have we found any, suggesting that the otherwise undeniable economic benefit represented by an actual reduction in pecuniary liabilities somehow disappears simply because the beneficiary remains insolvent following the reduction. In practical effect, Manufacturers seeks judicial creation of a special rule exempting a whole class of (insolvent) creditor-beneficiaries from the trustee's avoidance powers. The proposed exemption runs afoul of both the spirit of § 547(b) and the counsel of common sense. Surely a creditor whose bills have been paid off – even if only in part – with a debtor's funds has been preferred

over the debtor's other creditors who have thereby been denied any opportunity to satisfy their claims from those same funds. Moreover, as a benefitted creditor is the first element of a preferential transfer claim, *see* § 547(b)(1), recognition of Manufacturers' proposed rule would raise the possibility of a potentially extensive, plainly intrusive, and utterly ancillary inquiry into the personal finances of potentially benefitted creditors whenever a trustee seeks to avoid a preference. With these considerations in mind, we refuse to graft a solvency condition onto the creditor-benefit requirement plainly stated in the statute.

Even less compelling is Manufacturers' fall-back argument that, in any event, the $175,000 reduction in Hodges' guaranty liability constituted only a de minimus benefit in light of his enormous overall debt and, as such, was insufficient to trigger the protections of § 547(b). Again, Manufacturers is left to argue a position lacking the support of pertinent authority or common sense. While we do not necessarily gainsay the possibility of a prepetition transfer of property so valueless as to render the preference provision inapposite (though, presumably, a fruitless avoidance claim would not knowingly be pursued under the circumstances), two points undercut application of such a principle here. First, in our view, the absolute value of the six-figure cash sum in question alone should preclude its characterization as de minimus, regardless of its value relative to some other particular measure. Second, if and when a comparative evaluation might be useful in resolving a truly arguable case, a de minimus finding should not be dictated by the unique financial position of the preferred creditor, or any other

entity whose idiosyncratic debt (or asset[3]) structure skews the appraisal. The value of transferred property may only be of significance – but then of real significance – to the debtor or its other, nonpreferred creditor(s). As the Trustee reminds us, "[m]aybe $175,000 is such a small amount to [Manufacturers] as to be considered a trifle, but it is anything but trifling to [debtors'] other creditors." Brief of Appellee at 7.

Finally, Manufacturers contends Hodges' liability exposure was not really reduced at all by the prepetition transfer, because under the terms of his guaranty, if the $175,000 should be returned to debtors in this avoidance proceeding, Hodges would again be liable as guarantor for that sum. The question of Hodges' benefit must be determined as of the time of the transfer, *see* 4 Collier on Bankruptcy ¶ 547.08 at 547-42 n. 4 (15th ed. 1993); *see, e.g., Taunt v. Fidelity Bank of Michigan (In re Royal Golf Prods. Corp.)*, 908 F.2d 91, 95 (6th Cir.1990), when the $175,000 reduction in his liability was a present fact and any future reversal of the situation simply a contingency. To prevail on appeal, Manufacturers must therefore establish that the mere possibility of nullification renders an executed reduction in liability an illusory benefit for purposes of § 547(b). Once again, however, Manufacturers has failed to cite pertinent supporting authority for

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[3] It bears noting that Manufacturers' reasoning would also permit a creditor to escape the trustee's avoidance powers by arguing that it was already so *wealthy* that a relatively minor prepetition transfer, preferring that creditor to perhaps far less prosperous counterparts, conferred on it no appreciable benefit.

its facially uncompelling position, which we reject for a number of reasons.

First of all, it is a patently circular attempt to bootstrap a preferential transfer out of § 547(b) – i.e., if we accept the argument and hold that Hodges did not actually benefit from the transfer because the reduction in his guaranty liability was subject to reinstatement if the Trustee prevailed on the § 547(b) claim herein, the transfer would, as a consequence of that very holding, withstand the Trustee's challenge and thereby confirm the actuality of Hodges' original benefit. On the other hand, while the Trustee's success in this proceeding will clearly deprive Hodges of the benefit he initially derived from the prepetition transfer, it is always the case that the successful pursuit of an avoidance claim nullifies the underlying benefit discriminately bestowed by the debtor on a particular creditor. That is the purpose of a § 547(b) claim. *See Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689, 692 (10th Cir. 1991), *aff'd, Barnhill v. Johnson*, ___ U.S. ___, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992). Furthermore, we note that Hodges' situation was not at all unique; courts have recognized, without regard to any special guaranty language, that guarantors must make good on their guaranties following avoidance of payments previously made by their principal debtors. *See, e.g., Lowrey*, 97 B.R. at 81 (quoting and following *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 894-95 (7th Cir.1988); *Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 816 F.2d 1222, 1223-24 nn. 4 & 6 (8th Cir.), *cert. denied*, 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 102 (1987); *In re Quality Takes Time, Inc.*, 96 B.R. 818-20 (Bankr.M.D.Tenn. 1989). Thus, acceptance of Manufacturers' argument that the benefit

requirement of § 547(b) cannot be satisfied when the preferred guarantor's reduction in liability is subject to potential reinstatement would effectively nullify the entire line of cases – including the earlier appellate decision herein – generally holding that trilateral preferences may be avoided and recovered.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: ROBINSON BROTHERS DRILLING, INC. and [sic] BROTHERS DRILLING COMPANY, Debtors.	)	
HAROLD G. LOWERY, Trustee, Appellee, v. MANUFACTURERS HANOVER LEASING CORP., Appellant, and GLOBAL FLUIDS, INC.; ABB VECTO-GRAY, INC., formerly known as GRAY TOOL COMPANY; FIRST NATIONAL BANK OF BETHANY, OKLAHOMA; HALLIBURTON COMPANY; J.D. HODGES; ITT COMMERCIAL FINANCE CORPORATION; LOR, INC.; PONDER FISHING TOOLS, INC., Creditors.	)	No. 93-6016

ORDER

(Filed Oct. 29, 1993)

Before LOGAN and BRORBY, Circuit Judges, and KANE,* District Judge.

This matter is before the court on appellant's petition for rehearing.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

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*Honorable John L. Kane, Jr., Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

IN THE UNITED STATE BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	) No. BK-83-1962-A) (Chapter 11)) (Substantively) Consolidated)
Debtors.	)
HAROLD G. LOWREY, CHAPTER 11 TRUSTEE FOR THE ESTATES OF THE DEBTORS,	) Adv. No. 86-0252
Plaintiff,	)
vs.	)
FIRST NATIONAL BANK OF BETHANY, ET AL.,	)
Defendants.	)

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT

(Filed Jan. 11, 1988)

This matter comes on for hearing on the Motion for Summary Judgment of Defendants, Gray Tool Company, Halliburton Company, ITT Commercial Finance Corp., LOR, Inc., Manufacturers Hanover Leasing Corp. and Ponder Fishing Tools, Inc. Plaintiff, Harold G. Lowrey, appeared by and through his counsel, Gary L. Morrissey of Kenan & Peterson, and defendants, Gray Tool Company appeared by and through its counsel, Robert N. Sheets of McFall McVay Sheets Lovelace & Juras, Halliburton Company appeared by and through its counsel, Doneen Douglas Jones of Fellers, Snider, Blankenship,

Bailey & Tippens, P.C., ITT Commercial Finance Corporation appeared by and through its counsel, John Decker, Manufacturing Hanover Leasing Corporation appeared by and through its counsel, James W. Vogt of Reynolds, Riding & Hargis, and Ponder Fishing Tools, Inc. appeared by and through its counsel, R. Bruce Kerr of Mahaffey & Gore.

The Court, having heard the statements of counsel, having reviewed the pleadings filed herein and being fully advised in the premises, finds that all parties hereto have stipulated that no issues of material fact exist and that the Trustee, under these circumstances, cannot utilize 11 U.S.C. §550(a) to recover payments received by defendants who hold guarantees of J. D. Hodges, an insider of debtor, outside of the 90 day period and within one year of the filing of the bankruptcy. Furthermore, the Court finds that a reading of 11 U.S.C. §550(a) does not indicate that Congress explicitly intended to circumvent 11 U.S.C. §547 by permitting recovery for transfers outside of the 90 day period and within one year from non-insider creditors. Based upon the ambiguities in 11 U.S.C. §550, the Court must consider the equities involved. A review of the equitable considerations and long settled credit practices involving guarantees, mitigates against permitting recovery from the non-insider creditors.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment is hereby granted and that Defendants, Gray Tool Company, Halliburton Company, ITT Commercial Finance Corporation, LOR, Inc., Manufacturers Hanover Leasing Corporation and Ponder Fishing Tools, Inc., have judgment in their favor for all monies received between 90

days and one year prior to the filing of the bankruptcies of Robinson Brothers Drilling, Inc. and Robinson Brothers Drilling Company.

/s/ Richard L. Bohanon
Richard L. Bohanon
United States Bankruptcy Judge

ENTERED ON JUDGMENT DOCKET

JAN 11 1988

APPROVED:

/s/ Doneen Douglas Jones
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UNITED STATE BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE: BK-83-1962-BH	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	ADV. PRO. NO. 86-0251
Debtor.	
HAROLD G. LOWREY, TRUSTEE,	
Plaintiff.	
v.	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J.D. HODGES; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; PONDER FISHING TOOLS, INC.; and VINSON SUPPLY CO.,	
Defendants.	

SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

(Filed FEB 19 1991)

At the end of the trial in this proceeding certain findings of fact and conclusions of law were entered into the record pursuant to Bankruptcy Rule 7052. It was determined generally that the plaintiff was insolvent at

the time of all the transfers in question; that J.D. Hodges, the debtor's chief executive, principal shareholder and guarantor of the debts in question, knew or had reasonable cause to believe it was insolvent from and after July 5, 1982; that the transfers in issue were not made in the ordinary course of business of Robinson Brothers; that the insider-guarantor, Hodges benefitted from the transfers to defendants Vinson and Ponder; that the defendants received more than they would have received if the case were a case under chapter 7 of title 11; and that the debts of the defendants holding promissory notes were incurred when the notes were executed and delivered to them.

Additionally, at the end of the plaintiff's case in chief his claims against Manufacturers Hanover Leasing Corp. arising from payments by Nova Energy, Inc. were dismissed pursuant to Bankruptcy Rule 7041 upon the conclusion that Manufacturers did not waive its security interest in the accounts receivable and it further was held that Gray Tool Co. was estopped to deny validity of the signature of J.D. Hodges appearing on its promissory note.

I further find that the payments in question to the remaining defendants all were on account of antecedent debts owed by the debtor before the respective transfers were made.

These supplemental findings and conclusions now address the remaining issues relating to the Manufacturers Hanover Leasing Corp., Gray Tool Company, Halliburton Co., Ponder Fishing Tools, Inc., and Vinson Supply Co.

ISSUES CONCERNING MANUFACTURERS HANOVER LEASING CORP.

Manufacturers loaned the debtor approximately $6,500,000 with which it acquired several drilling rigs and a helicopter. It granted MHLC a security interest in the equipment and accounts receivable arising from the rigs and its notes were guaranteed by Hodges. Since the collateral eventually proved to be worth substantially less than the debt MHLC was an undersecured creditor.

The primary issue remaining is whether the payments RBD made to MHLC reduced Hodges' exposure as a guarantor under the terms of the guaranties held by MHLC. Each of the guaranties provides that:

> This Guaranty shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereof, of any of the obligations is rescinded or must otherwise be restored or returned by the lender upon the insolvency, bankruptcy or reorganization of the borrower or otherwise, all as though such payment had not been made.

MHLC says that the effect of this is that the payments it received were not "for the benefit of a creditor" (Hodges) as required by § 547(b) (1)[1] for he received no benefit because he continues to have liability for the full amount due to the quoted language. In order for the trustee to be able to recover the funds transferred he

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[1] All references to 11 U.S.C. § 547 are to the version in effect at the time of the transfers which form the basis of the complaint.

must show that Hodges was a creditor; and that he benefitted from the payments. I conclude that he was a creditor within the meaning of § 101(9) of the Code for he certainly was a guarantor of the MHLC obligations. *See Lowrey v. First National Bank of Bethany*, 97 B.R. 77 (W.D. Okla. 1988) affirmed *Manufacturers Hanover Leasing Corp., et al. v. Lowrey*, 892 F.2d 850 (10th Cir. 1989). *See also Collier on Bankruptcy* ¶ 547.04[1]. The argument still is made that he did not benefit from the payments debtor made to MHLC. While this theory sounds convincing on its face it begs the purpose of the entire preferential avoidance scheme of the Bankruptcy laws. And, there is no crystal ball that can tell what the future will bring – it may well be that for a multitude of unforseen [sic] and unforeseeable reasons if MHLC is required to repay the transfer that Hodges may never make good on the guaranty and perforce will have benefitted from the payments his company made to MHLC. In any event he has had a "benefit" for the period of time since the payments were made for MHLC has not called upon him to perform his guaranty for some 7 or 8 years.

The "benefit" issue was discussed in the much debated *Deprizio* case where it says:

> The outsiders who must kick into the pool when the trustee uses the avoiding powers retain their contractual entitlements; all the trustee's recovery does is ensure that those entitlements (as modified by any statutory priorities) – rather than the efforts of insiders to protect their own interests, or the cleverness of outsiders in beating the 90-day deadline – determine the ultimate distribution of the debtor's net assets. *Levit v.*

Ingersoll Rand Financial Corp., 874 F.2d 1186, 1195 (7th Cir. 1989) (Emphasis supplied.)

This holding shows that the courts adopt an extremely strict approach when viewing payments to creditors whose debts are guaranteed by insiders and will repudiate "clever" attempts to evade the trustee's avoidance powers in such circumstances. *Deprizio* has been followed by the Court of Appeals for this Circuit in this very proceeding. *See Manufacturers Hanover Leasing Corp., et al. v. Lowrey,* 892 F.2d 850 (10th Cir. 1989). While this may not be the law of the case on this issue as argued by the trustee it is a strong indication of the direction the Court of Appeals is taking in insider guarantee cases. To hold that these payments did not benefit Hodges due to the contractual language would permit every creditor holding guaranties to avoid liability for preferential payments by using the identical language. In following *Deprizio* the Court of Appeals clearly indicates that this result would be unacceptable.

Accordingly I conclude that Hodges did benefit from the payments to MHLC with the meaning of § 547(b)(1). Since MHLC is an undersecured creditor it received, as a result of these payments, more than it would have received if the case were in chapter 7, which is nothing.

It previously was held that the payments were made more that [sic] 45 days after the debts were incurred, which was the date of execution and delivery of the notes.

The trustee, therefore, can avoid the transfers and recover the amounts paid from MHLC.

ISSUES CONCERNING HALLIBURTON CO.

Halliburton also argues that Hodges is not a creditor of the debtor but that issue is dealt with in the preceding section and it is concluded that Hodges is a creditor within the defined meaning of that term. Its argument that Hodges did not benefit from the payments also is answered above.

Halliburton does make a unique argument concerning whether it received more than it would have received if the case were one under chapter 7. It appears that Halliburton's claim was partially secured for it held statutory liens on some good oil and gas working interests. The evidence shows that when it received the debtor's notes it "booked" the debt as partially secured and partially unsecured. For valid income tax reasons it "charged off" the unsecured portion. The complained of payments were then applied to the secured portion of the debt. In the event the case had been in chapter 7 Halliburton would have realized on its statutory liens to the extent of the amounts received. It argues from these facts that it, therefore, did not receive more than would have been paid to it in Chapter 7.

The trustee relies upon authority holding that, under such circumstances, it is presumed that receipts by a creditor are applied toward the unsecured or unsecured portion of the debt. *See Drabkin v. A.I. Credit Corporation*, 800 F.2d 1153, 1157 (D.C. Cir. 1986). That may be sound law but here the presumption is effectively rebutted by Halliburton. The credible evidence is ~~that it applied~~ the

receipts to the secured portion of the debt for valid business reasons without seeking to defeat the potential preferential aspects of the transfer. If the estate had been liquidated in chapter 7 Halliburton would have been entitled to realize upon its liens at least to the extent of the payments received.

The trustee argues that had Halliburton sought to foreclose on its liens it would have sued for the full amount owed to it, both secured and unsecured. Such may well be the case but still does not answer the issue presented here.

Since Halliburton did not receive more than it would have had upon liquidation the trustee's complaint against it must fail and be dismissed.

ISSUES CONCERNING VINSON SUPPLY CO.

Vinson has sold pipe to the debtor and filed statutory liens against wells operated by it for approximately $1,000,000. These liens affected 100% of the working interest in these leases. Subsequently the parties agreed that Vinson would have $100,000 and a note from RBD for the remaining amount of the debt to be paid in installments secured by RBD's working interest in the leases. Hodges guaranteed this note and Vinson released its statutory liens. It did not, however, perfect its mortgages until well after the bankruptcy petition was filed. The trustee sues for the two $100,000 payments made to Vinson pursuant to this guaranteed note.

To the extent Vinson raises issues addressed previously, such as whether RBD was insolvent, was Hodges a

creditor, did he receive a benefit, etc. the findings and conclusions are not repeated.

It does contend that it did not receive more than it would have received in a case under chapter 7. This argument fails since the mortgage liens were not perfected until after the bankruptcy and Vinson, thus, would not have held a secured claim. Because of the failure to perfect the liens the trustee could have avoided them under § 544 and the late perfection is a void act for being in violation of the automatic stay imposed by § 362. Furthermore, there are no considerations that might result in a holding that Vinson should be granted an equitable lien. It and RBD may have intended for the debt to be secured but, for reasons of its own, Vinson failed to perfect and thus lost the contemplated benefit. It is just such "secret" liens that are intended to be avoided by § 544.

Vinson also argues that the payment and its release of the statutory lien was a contemporaneous exchange for new value exempting the transfer under § 547(c) (1). The fact is, however, that an open account was converted to a promissory note – a new obligation was substituted for an existing one. Section 547(a) (2) says specifically that "new value . . . does not include an obligation substituted for an existing one." Vinson's reliance upon *Kenan v. Fort Worth Pipe Company*, 792 F.2d 125 (10th Cir. 1986) is misplaced for the facts are totally different. In *Kenan* the lien was released upon *payment* of the full amount of the debt – there was no substitution of one obligation for another. In the bankruptcy context, substitution is not the granting of new value and Vinson's argument falls. This conclusion is reached without valuing the liens Vinson held

upon wells which subsequently were plugged and abandoned.

It also contends that its statutory lien was "inchoate" and its relinquishment constituted new value. The basis for this argument is that at the time of the release Vinson still was within the statutory time to file a new lien on the leases to which it supplied pipe. Such may be the case but the fact remains that here we have a substitution of obligations within the § 547(a) (2) exception, not a forbearance in return for payment. Vinson simply cannot change the facts from what they are to what it might like them to be.

Accordingly I conclude that the trustee is entitled to avoid the transfers to Vinson and recover the amounts paid to it.

ISSUES CONCERNING PONDER FISHING TOOLS, INC.

Ponder provided services to RBD's Cody well and filed a statutory lien against the lease for almost $135,000. In June, 1983 RBD paid Ponder $57,000 for a release of the working interests of third parties.[2] It continued to have its lien against RBD's working interest. The Cody well subsequently was plugged and abandoned.

Ponder argues that the $57,000 payment is within the "contemporaneous exchange for new value" exception contained in § 547(c) (1). This argument, however, cannot

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[2] Since RBD paid the $57,000 to Ponder within the 90 days before the date of filing the petition it is not pertinent that Hodges did not guarantee the Ponder debt.

hold for to be within the exception the new value must be "given to the debtor." Here the payment was made to a lawyer and paid on to the third parties. The proof shows that RBD received no benefit from the payment even though the others paid what they owed it when Ponder delivered the release. The net effect of the transaction did not result in any benefit to RBD but rather a diminution of the estate.

Ponder also argues that the exception of § 546(c) (6) applies to it. This provision excepts a transfer which is the fixing of a statutory lien caused by its relation back to a previous date. The argument does not apply here for Ponder continued to have its statutory lien on the interest of RBD in the Cody well and RBD did not benefit from the transaction.

By receiving the payment Ponder received more than it would have had in a case under chapter 7 where it would have received nothing since its secured claim against RBD would have had no value and it had no unsecured claim against the non-operator working interest owners.

It also is insignificant that the trustee has not sought to recover from the other Cody interest owners for they were not paid with estate funds.

ISSUES CONCERNING GRAY TOOL COMPANY

In early 1983 Gray owed RBD for services and delivered a note for $100,000 to it. Subsequently RBD paid $42,500 on this note in two separate payments. Hodges name appears as a co-maker.

Gray initially argues that since the signature of Hodges is apparently not his that it should be relieved from liability for any preferential payment. However, after the bankruptcy, Gray sued on the note and obtained an agreed judgment. It previously has been concluded that Hodges and Gray are estopped from denying validity of the note at this late date. Abundant evidence was received to show that it was not uncommon for Hodges to authorize others within the RBD organization to sign his name to various corporate and personal instruments and the parties cannot not [sic] now take inconsistent positions on the same issue in related litigation. *U.S. v. 49.01 Acres of Land*, 802 F.2d 387 (10th Cir. 1986). *And see Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979); 15 O.S. § 75; and *Appleman v. Pepis*, 246 P.2d 255 (Okla. 1926).

Gray also argues that since Hodges is a co-maker rather than a guarantor that he is not entitled to contribution until he has paid more than his proportionate share of the indebtedness. It would then follow that he is not a creditor of the estate and the payment would thus not be preferential. It is bankruptcy law not state law that controls the determination of whether payments are preferential. It remains that "[a] guarantor or surety for the debtor, or an endorser of notes or checks will be a creditor under the Code . . . " *Collier on Bankruptcy* ¶ 547.04[1]. If, due to the circumstances of the way the note was drawn in this particular case Hodges is not a "guarantor" he is a surety or an endorser and thus a "creditor" for preference purposes.

Finally Gray argues that since he had guaranteed over $100,000,000 of RBD obligations that Hodges was so

hopelessly insolvent that the payment could not have benefitted him. The fact remains, however, that once RBD paid the $42,500 to Gray, Hodges was relieved of that much liability to it and this credit was recognized by Gray when it sued him. Hodges thus benefitted from the payment regardless of whether or not he was solvent.

From the above I conclude that the plaintiff-trustee is entitled to recover the $42,500 transferred to Gray.

CONCLUSION

The trustee is directed to submit his proposed form of judgment in accordance with the Findings of Fact and Conclusions of Law entered into the record and supplemented here within 7 days.

Dated: February 19, 1991

By the Court.

/s/ Richard L. Bohanon
Richard L. Bohanon
United States Bankruptcy
Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF OKLAHOMA

IN RE: BK-83-1962-A	:	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING CO.,	:	ADV. PRO. NO.
Debtors.	:	86-0251
HAROLD G. LOWREY, TRUSTEE,	:	
Plaintiff.	:	
vs.	:	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL CO.; HALLIBURTON CO.; J.D. HODGES; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.;	:	
and	:	
VINSON SUPPLY COMPANY,	:	
Defendants.	:	

JUDGMENT

(Filed Feb. 22, 1991)

Pursuant to the findings of fact and conclusions of law entered by this court on February 15, 1991 and supplemented in writing on February 19, 1991, judgment is

hereby entered for the plaintiff against Vinson Supply Company in the principal amount of $200,000; against Ponder Fishing Tools, Inc. in the principal amount of $57,000; against Gray Tool Co. in the principal amount of $42,500 and against Manufacturer's Hanover Leasing Corp. in the principal amount of $175,812.50, with his costs and interest at 6.62%.

This judgment is entered without prejudice to plaintiff's request for prejudgment interest which will be heard in regular course.

DATED: February 22, 1991

By the Court.

/s/ Richard L. Bohanon
Richard L. Bohanon
U.S. Bankruptcy Judge

ENTERED ON JUDGMENT DOCKET: FEB 22 1991

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	)	No. 83-1962-A (Chapter 11)
	)	
Debtors.	)	
	)	Consolidated
HAROLD G. LOWERY, CHAPTER 11 TRUSTEE for the Estate of the Debtors,	)	
	)	
	)	ADV. PRO. NO. 86-251
Plaintiff,	)	
	)	
vs.	)	
	)	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J. D. HODGES, an individual; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.,	)	
	)	
and	)	
	)	
VINSON SUPPLY COMPANY,	)	
	)	
Defendants.	)	

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 09, 1991)

This matter comes on for review by the Court on the Combined Motion To Amend Findings Of Fact And To

Alter Or Amend Judgment filed by Manufacturers Hanover Leasing Corporation ("MHLC") and the Motion To Amend Findings Of Fact filed by Halliburton Company ("Halliburton").

After reviewing the Motions and listening to arguments of counsel, the Court finds that the Motions of MHLC and Halliburton should be sustained and that the Court should enter additional findings of fact and amend the Judgment.

ISSUES CONCERNING MHLC, HALLIBURTON AND VINSON SUPPLY

In supplementing the findings of fact the Court finds that in addition to Gray Tool Company, MHLC, Halliburton and Vinson Supply Company ("Vinson") contended that J. D. Hodges ("Hodges") was hopelessly insolvent, and therefore, the payments by Robinson Brothers to MHLC and Halliburton could not have benefitted Hodges.

The Court further finds that MHLC Exhibit 60 is a Personal Financial Statement of Hodges dated September 30, 1982. This Financial Statement valued Hodges' interest in Robinson Brothers at $30,000,000.00. Since this Court previously determined that Robinson Brothers was substantially insolvent on July 5, 1982, the Court finds that Robinson Brothers had no value to Hodges as of July 5, 1982, and the $30,000,000.00 value for 73% interest in Robinson Brothers should be excluded from Hodges' Personal Financial Statement. The Court further finds that this Financial Statement does not include any contingent liabilities relating to any debts of Robinson Brothers that

Hodges personally guaranteed which exceeded $100,000,000.00.

Thus, without taking into consideration any of Hodges' other assets listed on the Financial Statement dated September 30, 1982, many of which the Court notes are companies that have either filed bankruptcy or gone out of business, the Court finds that Hodges' assets should be reduced to $25,668,066.21, and his liabilities should be increased to $121,911,245.24. Accordingly, Hodges had a negative net worth of at least $96,243,179.03 during the year preceding the bankruptcy of Robinson Brothers. Nevertheless, as this Court previously determined, the payments to MHLC, Halliburton, Gray Tool Company and Vinson reduced Hodges' liability on his guaranty and, thus, he received a benefit.

The Court further finds that there was no evidence presented at trial or considered by this Court that these Defendants who held guaranties from an insider (Hodges) were preferred over other creditors of Robinson Brothers who did not hold guaranties from an insider of Robinson Brothers. However, the Court finds that under the facts and evidence presented, the Trustee satisfied each applicable element of Section 547(b) so as to allow judgment to be entered against MHLC, Ponder Fishing Tools, Inc., Gray Tool Company and Vinson Supply Co.

ISSUES CONCERNING HALLIBURTON

The Court further finds that the second note executed by Robinson Brothers and guaranteed by Hodges was not in existence when the payment to Halliburton was made. However, the Court need not reach the effect of this

finding based on the Court's ruling in favor of Halliburton on February 19, 1991.

An Amended Judgment will be filed commensurate with the filing of these Supplemental Findings of Fact.

DATED: May 9, 1991

/s/ Richard Bohanon
United States
Bankruptcy Judge

APPROVED:

/s/ James Vogt
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IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	No. 83-1962-A (Chapter 11)
Debtors.	
HAROLD G. LOWERY, CHAPTER 11 TRUSTEE for the Estate of the Debtors,	Consolidated
Plaintiff,	ADV. PRO. NO. 86-251
vs.	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J. D. HODGES, an individual; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.,	
and	
VINSON SUPPLY COMPANY,	
Defendants.	

AMENDED JUDGMENT

(Filed May 09, 1991)

The above-styled matter comes on for review of the Combined Motion For Additional Findings Of Fact And To Alter Or Amend Judgment filed by Manufacturers

Hanover Leasing Corp. and the Motion to Amend Findings of Fact filed by Halliburton Co. After reviewing the Motions, listening to arguments of counsel, and being duly advised in the premises, the Court finds that said Motions should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant, Vinson Supply Company, in the principal amount of $200,000.00; against Ponder Fishing Tools, Inc., in the principal amount of $57,000.00; against Gray Tool Company in the principal amount of $42,500.00; and against Manufacturers Hanover Leasing Corp. in the principal amount of $175,812.50; with interest on each of these respective amounts to be at 6.62% from the date of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against the defendant, J. D. Hodges, in the amount of $475,312.50.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's request for pre-judgment interest is denied and the plaintiff's request for costs shall be determined in accordance with the further orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Manufacturers Hanover Leasing Corp. shall have judgment against J. D. Hodges in the amount of $175,812.50 with interest at 6.62% from date of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered for Halliburton Co. against plaintiff.

Dated: MAY 9 1991.

/s/ Richard Bohanon
United States
Bankruptcy Judge

ENTERED ON JUDGMENT DOCKET

MAY 09 1991

Amended Judgment
In Re Robinson Brothers
Adv. Pro. No. 86-251
Signature Page

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IN THE UNITED STATE BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

IN RE:	)	No. BK-83-1962-A
ROBINSON BROTHERS DRILLING, INC., and ROBINSON BROTHERS DRILLING COMPANY,	)	(Chapter 11)
Debtors.	)	
HAROLD G. LOWREY, Chapter 11 Trustee for the Estate of the Debtors,	)	Adv. No. 86-0251
Plaintiff,	)	
v.	)	
FIRST NATIONAL BANK OF BETHANY; GLOBAL FLUIDS, INC.; GRAY TOOL COMPANY; HALLIBURTON CO.; J.D. HODGES, an individual; ITT COMMERCIAL FINANCE CORP.; LOR, INC.; MANUFACTURERS HANOVER LEASING CORP.; and PONDER FISHING TOOLS, INC.,	)	
and	)	
VINSON SUPPLY, CO.,	)	
Defendants.	)	

AMENDED JUDGMENT

(Filed MAY 24 1991)

The judgment of March 5, 1991, and the amended judgment of May 9, 1991, should be further amended to dispose of the cross claim of Halliburton Company

against J.D. Hodges. This judgment incorporates the judgment and amended judgment previously entered and

IT IS FURTHER ORDERED that Halliburton Company recover nothing herein on its cross claim against Defendant, J.D. Hodges, and based upon this Court's entry of judgment in favor of Halliburton Company against the Trustee, Halliburton Company is not entitled to judgment against Defendant, J.D. Hodges.

DATED: MAY 24 1991

/s/ Richard L. Bohanon
Richard L. Bohanon
United States Bankruptcy
Judge

ENTERED ON JUDGMENT
DOCKET

MAY 24 1991

APPROVED:

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBINSON BROTHERS DRILLING, INC. and ROBINSON BROTHERS DRILLING COMPANY,	)	
Debtors,	)	Case Nos.
HAROLD G. LOWREY, TRUSTEE,	)	CIV-91-874-R
Appellee and Cross-Appellant,	)	CIV-91-998-R
vs.	)	CIV-91-1154-R
MANUFACTURERS HANOVER LEASING CORP.,	)	
Appellant and Cross-Appellee.	)	

ORDER

(Filed DEC 10 1992)

This appeal and cross-appeal arises from an adversarial proceeding brought by Harold G. Lowrey, Trustee ("Trustee"), against Manufacturers Hanover Leasing Corp. ("Manufacturers") to avoid, as preferential transfers under 11 U.S.C. § 547(b), certain payments made to Manufacturers by Robinson Bros. Drilling, Inc. and Robinson Bros. Drilling Company ("Debtors") between a period of 90 days and one year before the Debtors' bankruptcy petition was filed.[1] Manufacturers denied that the transfers were avoidable arguing that J.D. Hodges, an insider-creditor of the Debtors, derived no benefit from the transfers and received no more from the transfers

[1] The Court has jurisdiction over the appeal and cross-appeal under 28 U.S.C. § 158(a).

than he would have received in a chapter 7 liquidation. At trial, the bankruptcy court held that the transfers to Manufacturers were avoidable and entered judgment in favor of the Trustee in the amount of $175,812.50. The bankruptcy court, however, denied the Trustee's request for prejudgment interest.

In reviewing the bankruptcy court's decision, the district court must accept the bankruptcy court's factual findings unless they are clearly erroneous. *In re Mullet*, 817 F.2d 677, 678 (10th Cir. 1987). By comparison, questions of law are reviewed *de novo* by the district court. *Id.* at 679. If the bankruptcy court's legal conclusions are drawn from undisputed evidence, the district court may make an independent determination from the bankruptcy court's conclusions. *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1169 (10th Cir. 1985).

Manufacturers contends that the bankruptcy court erred in finding that the transfers to Manufacturers were made "to or for the benefit" of J.D. Hodges. See, 11 U.S.C. § 547(b)(1). It asserts that the evidence presented at trial revealed that J.D. Hodges personally guaranteed over $100,000,000.00 in debts of the Debtors and that J.D. Hodges could not respond on his guaranties. Manufacturers also asserts that the evidence revealed that J.D. Hodges had a negative worth of at least $96,243,179.03 during the year preceding bankruptcy. Because J.D Hodges' negative worth was so great and the payments to Manufacturers only reduced J.D. Hodges' negative worth by $175,812.50, Manufacturers argues that J.D. Hodges did not benefit from the payments or if he did,

the benefit was so minimal that it should not be recognized under the rule of *de minimis non curat lex*. Consequently, Manufacturers argues that the payments do not constitute preferential transfers and are not avoidable under § 547(b).

In the Court's view, the transfers to Manufacturers benefitted J.D. Hodges. The Court concludes that the payments to Manufacturers were an improvement in the debt of J.D. Hodges. Although the improvement was slight, the Court concludes that such improvement was sufficient for purposes of § 547(b)(1). Therefore, the Court concludes that the Trustee proved § 547(b)(1) as to J.D. Hodges.

The Court also rejects Manufacturers' argument that J.D. Hodges' debt was not actually improved because he would remain liable as a guarantor for the payments upon avoidance by the Trustee. The Court concludes that for purposes of § 547(b)(1), the benefit to the insider-creditor should be determined at the time of the transfer. 4 *Collier on Bankruptcy*, § 547.08 n. 4 (15th ed. 1992). Thus, subsequent events such as the avoidance of the payments by the Trustee should not be taken into consideration. In this case, J.D. Hodges' liability to Manufacturers was reduced by $175,812.50 at the time the transfers were made. Therefore, the Court concludes that the transfers were "for the benefit" of J.D. Hodges and satisfy § 547(b)(1).

Manufacturers next contends that the bankruptcy court erred in determining for purposes of § 547(b)(5) whether or not Manufacturers received more from the transfers than what it would have received if the case

were under chapter 7. It argues that the bankruptcy court should have determined whether or not J.D. Hodges received more from the transfers than he would have received in a case under chapter 7. Manufacturers argues that had such determination been made, the bankruptcy court would have found that the § 547(b)(5) was not satisfied because J.D. Hodges received nothing from the transfers.

The Court agrees with Manufacturers that the Trustee must prove the requirement of § 547(b)(5) as to J.D. Hodges in order to avoid the transfers to Manufacturers. *See, In re C-L Cartage Co., Inc.*, 899 F.2d 1490, 1493 (6th Cir. 1990). And although the. bankruptcy court did not consider the issue of whether or not J.D. Hodges would have received more from the transfers than in a chapter 7 liquidation, the Court concluded that the issue need not be remanded for consideration. Both Manufacturers and the Trustee agree that J.D. Hodges would have received nothing in chapter 7. However, the Court concludes that J.D. Hodges did receive a benefit from transfers. Therefore, because J.D. Hodges did receive more from the transfers than in a chapter 7 liquidation, § 547(b)(5) has been satisfied.

In addition, Manufacturers argues that § 547 and § 550 of the Bankruptcy Code do not permit the Trustee to avoid transfers made to non-insider creditors between 90 days and one year preceding the bankruptcy petition date. This issue was addressed and decided in *In re Robinson Brothers Drilling, Inc.*, 97 B.R. 77 (W.D. Okla. 1988), *aff'd*, 892 F.2d 850 (10th Cir. 1989). The Court will not address the issue again.

On cross-appeal, the Trustee contests the bankruptcy court's denial of prejudgment interest on the preferential payments. The Trustee argues that the current trend of case law is to award prejudgment interest to a trustee who successfully overturns preferential transactions.

The Bankruptcy Code does not specifically provide for an award of prejudgment interest in the recovery of preferential transfers. *In re Investment Bankers, Inc.*, 136 B.R. 1008, 1023 (Bankr. D. Colo. 1989). The decision to award prejudgment interest in a preferential transfer action is therefore left to the sound discretion of the bankruptcy court. *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 342 (Bankr. E.D. Pa. 1988). The bankruptcy court, in this case, denied prejudgment interest on the basis that the delay in the proceedings was not caused by either party and because the request for prejudgment interest was not included in the final pretrial order. Under the facts in this case, the Court cannot find that the bankruptcy court abused its discretion.

Finally, the Court agrees with Manufacturers that the appeal in CIV-91-874-R is premature. In litigation involving multiple defendants, a judgment is not final until the case has been disposed on all issues raised among all litigants. Bankruptcy Rule 7054. Because all issues between all parties were not disposed of until the judgment entered on May 24, 1991, the Court concludes that the appeal taken from the judgment entered on February 22, 1991 should be dismissed as premature.

Based upon the foregoing, the bankruptcy court's decisions for which appeals CIV-91-998-R and CIV-91-1154-R were filed are hereby AFFIRMED. The

appeal in CIV-91-874-R is hereby DISMISSED as premature.

ENTERED this 10th day of December, 1992.

/s/ David L. Russell
DAVID L. RUSSELL
UNITED STATES DISTRICT
JUDGE

ENTERED IN JUDGEMENT
DOCKET ON 12-10-92

BANKRUPTCY CODE

11 U.S.C. § 547. Preferences

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer –

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of –

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

* * *